STATE OF MICHIGAN

COURT OF APPEALS

TOWN & COUNTRY APARTMENTS, Petitioner-Appellant, v CITY OF WIXOM, Respondent-Appellee.	UNPUBLISHED April 8, 2003 No. 238471 Tax Tribunal LC No. 00-238950

Before: Gage, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Petitioner Town & Country appeals as of right from an order entered by the Michigan Tax Tribunal (MTT) that granted respondent City of Wixom's motion to dismiss petitioner's tax appeal. The MTT dismissed the petition because of petitioner's repeated failure to timely file a valuation disclosure and motion to set aside default. On appeal, petitioner challenges the dismissal and also challenges the tribunal's order granting the city's motion to disqualify petitioner's counsel. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. FACTUAL AND PROCEDURAL HISTORY

A. Nature of Tax Dispute

In October 1996, petitioner filed a petition in the small claims division of the MTT challenging the 1996 taxable value of its property, an apartment complex, as computed by the city. Specifically, petitioner alleged:

> The 1995 assessment was $1,246,000 and [the] taxable value was the same. The 1996 assessment is $1,480,000 and the taxable value is $1,480,000. Pursuant to Public Act 415 of 1994[,] the taxable value can be no greater than the 1995 taxable value ($1,246,000) times the previous year's cost of living index (1.028) or $1,280,000. The assessor has set the taxable value at $1,480,000, which is in contravention of the law.

Petitioner argued that the 1996 taxable value reflected an unconstitutional increase in the taxable value of its property under Proposal A.[1]

The city's position was that the increase in the "taxable value" in an amount higher than the limit set in Proposal A was proper because of changes in the vacancy rate at petitioner's apartment complex; the increase reflected a higher than normal occupancy rate in 1996. According to the city, the increased occupancy rate constituted an "addition" under MCL 211.34d(1)(b)(vii), which defines "additions" to include, in some circumstances, increases in the value of property attributable to an increased occupancy rate. See *WPW Acquisition Co v City of Troy*, 466 Mich 117, 120; 643 NW2d 564 (2002). The city maintained that because the constitutional and statutory amendments brought about by the adoption of Proposal A permit adjustments for "additions," there was no illegal increase in the "taxable value."[2]

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[1] "Proposal A added language to Const 1963, art 9, § 3 that generally limits annual increases in property tax assessments on a parcel of property as long as that property is owned by the same party." *WPW Acquisition Co v City of Troy*, 466 Mich 117, 119; 643 NW2d 564 (2002). Proposal A capped the amount that the "taxable value" of property may increase each year, even if the "true cash value," that is, the actual market value, of the property rises at a greater rate. *Id.* at 122. After the electorate passed Proposal A, our Legislature enacted 1994 PA 415 to revise relevant portions of the General Property Tax Act (GPTA), MCL 211.1 *et seq.*, including MCL 211.27a, which now provides, in pertinent part:

> (1) Except as otherwise provided in this section, property shall be assessed at 50% of its true cash value under section 3 of article IX of the state constitution of 1963.
>
> (2) Except as otherwise provided in subsection (3), for taxes levied in 1995 and for each year after 1995, the taxable value of each parcel of property is the lesser of the following:
>
> (a) The property's taxable value in the immediately preceding year minus any losses, multiplied by the lesser of 1.05 or the inflation rate, plus all additions. . . .
>
> (b) The property's current state equalized valuation.

[2] We note that subsequent to the proceedings before the MTT, the Michigan Supreme Court decided *WPW Acquisition*, in which the Court stated and ruled:

> At issue is the constitutionality of a statutory provision, MCL 211.34d(1)(b)(vii), that purports to include, in certain circumstances, an increase in the value of the property because of increased occupancy by tenants within the meaning of "additions." We conclude that this statutory provision is unconstitutional because it is inconsistent with the meaning of the term "additions" as used in Proposal A. [*WPW Acquisition*, *supra* at 119.]

(continued…)

B. Tax Tribunal Proceedings Concerning Dismissal and Attorney Disqualification

The proceedings in this matter have been extensive, covering several years, and included numerous motions for summary disposition that were ultimately denied, excluding the city's motion to dismiss at issue here.[3] However, for purposes of this opinion, the only relevant motions and rulings concern the order dismissing the petition for failure to comply with rules and orders of the MTT and the tribunal's order disqualifying petitioner's counsel.

Attorney Disqualification

Initially, Goldstein & Burstein, P.C., represented the city, and Hoffert & Associates, P.C. (Hoffert), represented petitioner. Primarily, Mark Burstein was handling the matter for the city. In March 1997, Goldstein & Burstein filed a motion to withdraw as counsel for the city. The motion simply indicated that the city wished to be represented by its assessor and the city attorney. The MTT granted the motion to withdraw in June 1997. In November 1997, however, the city retained the law firm of Pollard & Albertson, P.C., to represent it in the continuing tax appeal with petitioner.

In October 1999, the city filed a motion to disqualify Hoffert as petitioner's counsel. The city asserted that Burstein had joined the law firm of Hoffert & Associates in the fall of 1998; therefore, a conflict of interest existed under MRPC 1.9 that precluded Hoffert from further representing petitioner. The city complained that its repeated requests to Hoffert to withdraw as counsel had been ignored. In April 2000, the MTT granted the motion to disqualify, noting that Burstein had not been appropriately screened by Hoffert, as required by MRPC 1.10, where Burstein, while employed by Hoffert, signed a motion in the case on behalf of petitioner. Petitioner moved for reconsideration, arguing, in part, that Burstein was leaving the firm effective June 1, 2000. Pursuant to an order entered on July 19, 2000, the tribunal denied the motion as untimely under MCL 205.752.[4]

In December 2000, petitioner hired Frederick Mawson[5] of Collier's International as its agent to further pursue the tax appeal. An order allowing substitution of representatives was entered in February 2001 by the MTT. The city sought reconsideration of the order of substitution, arguing that Collier's International now employed Myles Hoffert and David Marmon both formerly of Hoffert & Associates. The motion for reconsideration was denied; the tribunal believed that Hoffert and Marmon were appropriately screened from participation in the case pursuant to MRPC 1.10.

(…continued)

It would appear that the city's argument has been invalidated by *WPW Acquisition*.

[3] In June 1999, the case was transferred from the small claims division of the MTT to the entire tribunal.

[4] MCL 205.752(2) provides that "[t]he tribunal may order a rehearing upon written motion made by a party within 20 days after the entry of the decision or order. A decision or order may be amended or vacated after the rehearing."

[5] Mr. Mawson is not an attorney.

Dismissal

The parties were scheduled by the MTT to file and exchange valuation disclosures by September 3, 1999, with regard to the asserted values of the property. Petitioner filed a motion to extend the time to file and exchange its valuation disclosure,[6] arguing that the city was requesting withdrawal of petitioner's counsel (Burstein-Hoffert situation); therefore, more time was needed to retain new counsel and complete a valuation disclosure. We note that an order of disqualification was not entered by the MTT until April 2000. The motion was signed by Burstein, and it requested a 120-day extension.[7] In response to the motion, the city stated that there was no real need to secure appraisals and exchange valuation disclosures because the appeal did not concern the "true cash value" of the property but only the "taxable value" and petitioner's assertion that the increase in the "taxable value" violated Proposal A. At this point in time, it would appear that the city had also not yet filed a valuation disclosure.

The MTT granted the motion to extend the time to file and exchange valuation disclosures pursuant to an order dated April 25, 2000. Acknowledging the city's reference to the lack of any need to prepare and exchange valuation disclosures, the MTT stated that "although petitioner is not contesting the subject property's assessed value for the tax years at issue, valuation disclosures are necessary as the parties are contesting the calculation of the property's taxable values beyond the cap due to a loss or addition[.]"

Pursuant to an order of procedure issued by the MTT in July 2000, the parties were ordered to exchange and file valuation disclosures on or before December 1, 2000.[8] The order of procedure also provided that failure to submit a valuation disclosure would result in a party being placed in default. On December 20, 2000, having not yet received a valuation disclosure from petitioner, the tribunal entered a sua sponte order of default against petitioner for failure to file and exchange a valuation disclosure as required. The order provided that petitioner was to file and exchange a valuation disclosure and to file a motion to set aside default within twenty-one days of the entry of the sua sponte order of default. The order further provided that failure to comply would result in the dismissal of the case.[9]

On December 28, 2000, petitioner, now represented by Collier's International,[10] filed a motion requesting a thirty-day extension of time to file necessary documents, and further

[6] The record reflects that this motion was served on the city on September 3, 1999.

[7] This motion was the document relied upon by the MTT as indicating that Burstein had not been properly screened by Hoffert.

[8] We note that the deadline is well beyond the request for a 120-day extension made by petitioner back in September 1999; however, no actions were taken by the tribunal.

[9] We note that the tribunal had granted a motion filed by the city seeking a protective order with regard to its filed, but not yet exchanged, valuation disclosure. The city sought the order because of its belief that petitioner would not file and exchange a valuation disclosure. The MTT, acknowledging petitioner's failure to file a valuation disclosure and the default, ordered that the city could withhold exchanging its valuation disclosure.

[10] Although Collier's International had filed a notice of substitution on December 20, 2000, an order by the tribunal allowing substitution did not enter until February 2001.

requesting that the filing of any such documents be deemed timely. The motion was predicated on the argument that Collier's International needed time to familiarize itself with the case. Additionally, on December 28, 2000, petitioner filed a document titled "response in lieu of filing a valuation disclosure," in which petitioner argued that a disclosure was unnecessary because the "true cash value" of the property was not in dispute. The document did not request any ruling by the MTT on whether a valuation disclosure should be required but simply noted that a pre-hearing conference was forthcoming.

Once again, the MTT allowed an extension of time, ordering that petitioner file and exchange a valuation disclosure within fourteen days of the order, which was entered on June 18, 2001, making the due date July 2. The order also required petitioner to file a motion to set aside default within fourteen days. Further, the order acknowledged and reinforced the earlier order providing that valuation disclosures were necessary to address the "addition" issue. Finally, the order provided that failure to comply would result in dismissal of the case or the scheduling of a default hearing.

On July 24, 2001, the city filed a motion to dismiss the case due to petitioner's continued failure to file and exchange a valuation disclosure. Petitioner responded by asserting that dismissal was too strict, in that the city suffered no prejudice where appraisals of the property were unnecessary because the "taxable value" was only at issue, not the "true cash value."

The MTT granted the city's motion to dismiss the petition, ruling:

> The Tribunal, having given due consideration to the motions, the response, and the case file, finds that (i) the Tribunal entered an Order on June 18, 2001, partially granting Petitioner's Motion to Extend Time, (ii) the Order of June 18, 2001, required Petitioner to file and exchange its valuation disclosure and file a motion to set aside default within 14 days of the entry of that Order, (iii) although Petitioner indicated that its valuation disclosure was attached to its response to the Motion, no valuation disclosure was, in fact, attached to the response, (iv) nevertheless, the valuation disclosure would have been untimely even if it was attached, (v) further, Petitioner has not filed a motion to set aside default, (vi) as such, Petitioner has failed to comply with the Order of June 18, 2001, (vii) the Order of June 18, 2001, clearly indicated that Petitioner had been placed in default and was still in default, (viii) contrary to Petitioner's contentions, the granting of the Motion is based on Petitioner's failure to timely cure the default and not prejudice, (ix) in that regard, the Tribunal placed Petitioner in default for failing to comply with a Tribunal order and provided Petitioner with not one, but two opportunities to cure the default, (x) although Petitioner's new authorized representative should not be held accountable for the failures of Petitioner's prior authorized representative . . ., Petitioner's new authorized representative was still required to both file a valuation disclosure relative to the value of the loss or addition in dispute, as required by the Order of April 25, 2000, and timely cure the default, as provided by TTR 247, and (xi) the actions of Petitioner's new authorized representative do not, however, merit the awarding of costs and attorney fees in this case . . . .

Petitioner appeals as of right, challenging the dismissal of the tax appeal and the disqualification of Hoffert.

II. ANALYSIS

A. Standard of Review

Review of a tribunal's decision is typically limited to whether a decision is authorized by law and whether the tribunal's factual findings were supported by competent, material, and substantial evidence on the whole record. *Professional Plaza, LLC v Detroit*, 250 Mich App 473, 474; 647 NW2d 529 (2002). In *Stevens v Bangor Twp*, 150 Mich App 756, 761; 389 NW2d 176 (1986), this Court, addressing the authority of the MTT to dismiss a petition and this Court's review of a dismissal, stated:

> The power of the Tax Tribunal to dismiss a petition because of a petitioner's noncompliance with a rule or order of the tribunal is unquestionable. *Lawrence v Dep't of Treasury*, 128 Mich App 741; 341 NW2d 200 (1983). The tribunal's actions, however, are reviewable for an abuse of discretion. See, *e.g.*, *Zenith Industrial Corp v Dep't of Treasury*, 130 Mich App 464; 343 NW2d 495 (1983); *Turner v Lansing Twp*, 108 Mich App 103, 112-113; 310 NW2d 287 (1981) . . . .

B. Attorney Disqualification

Petitioner argues that the MTT erred in disqualifying Hoffert because Burstein was screened from involvement in the case, and the motion signed by Burstein involved merely a ministerial matter. Additionally, petitioner argues that the MTT should have granted the motion for reconsideration of the issue, where Burstein was leaving the firm and this fact was newly discovered. We disagree.

MRPC 1.9(b) provides that "[u]nless the former client consents after consultation, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated has previously represented a client (1) whose interests are materially adverse to that person, and (2) about whom the lawyer had acquired information . . . that is material to the matter." MRPC 1.10 imputes the disqualification of an attorney under MRPC 1.9 to a law firm employing the disqualified attorney unless the disqualified attorney is screened from any participation in the matter, is apportioned no fee, and written notice is promptly given to the appropriate tribunal to enable it to ascertain compliance with MRPC 1.10.

Here, Burstein signed the motion to extend time to file and exchange a valuation disclosure while Burstein was employed with Hoffert, which firm was representing a client, Town & Country, that had interests directly adverse to the city, which was once represented by Burstein. This fact, which is undisputed, provided sufficient evidence to support the MTT's conclusion that Burstein had not been properly screened despite petitioner's affidavits indicating that Burstein was not involved in the case. We also question whether the motion to extend time was merely ministerial and insignificant, where failure to file the valuation disclosure eventually formed the basis for dismissal of the tax appeal. Moreover, there was no evidence that

petitioner provided written notice to the MTT concerning the issue of a conflict of interest as required by MRPC 1.10(b)(2).

With regard to petitioner's argument that the MTT should have granted the motion for reconsideration because Burstein left Hoffert, the argument lacks merit. First, the act of Burstein leaving the law firm did not necessarily end any conflict of interest that would free Hoffert to continue representation. See MRPC 1.10(c). Second, the motion for reconsideration was untimely, in that it was not filed within twenty days of entry of the challenged order. MCL 205.752. Third, and finally, as to petitioner's reliance on MCR 2.612, which gives a court the authority to grant relief from an order based on newly discovered evidence, we find that petitioner failed to preserve any argument under MCR 2.612 because it was not presented to the MTT, nor did the motion for reconsideration frame Burstein's act of leaving as being newly discovered. The order of disqualification is affirmed.[11]

C. Dismissal

Petitioner argues that the MTT erred in dismissing the action because a valuation disclosure was simply unnecessary. Tribunal rules, and specifically 1999 AC, R 205.1252(1), require a party to file and exchange a valuation disclosure when ordered by the tribunal as in the instant case. Regardless of whether a valuation disclosure was necessary, petitioner was not at liberty to continually ignore the orders of the MTT simply because it was in disagreement with the MTT's finding that a disclosure remained necessary because an "addition" was at issue.[12] Moreover, petitioner repeatedly requested time to file and exchange the valuation disclosure; it did not file any motion or objection, which required a tribunal ruling, challenging the legal basis for the tribunal's decision that a valuation disclosure was necessary under the circumstances. We are left with a record showing blatant disregard for the MTT's rulings and orders with occasional reference by petitioner that a valuation disclosure was unnecessary but without any direct challenge to the requirement. Furthermore, petitioner never filed a motion to set aside the default as required. We also note that petitioner's answer to the city's motion to dismiss was

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[11] We recognize that our ruling on the dismissal issue would apparently render the issue of disqualification moot; however, to the extent that the change in representation affected petitioner's ability to comply with MTT orders, we thought it appropriate to address the matter.

[12] Without rendering a decision one way or the other on the matter, it would appear that determination of the true cash value was necessary under MCL 211.34d(1)(b)(vii), wherein it is provided:

> For purposes of determining the taxable value of property under section 27a, the value of an addition for the increased occupancy rate is the product of the increase in the true cash value of the property attributable to the increased occupancy rate multiplied by a fraction the numerator of which is the taxable value of the property in the immediately preceding year and the denominator of which is the true cash value of the property in the immediately preceding year, and then multiplied by the lesser of 1.05 or the inflation rate.

filed beyond the fourteen-day response period.[13] If this course of conduct were allowed to continue, there would be no end to the tax appeal.

Petitioner argues at length that the city itself had argued below that valuation disclosures were unnecessary. This argument is irrelevant considering the fact that the city, unlike petitioner, abided by the MTT's order, which provided that disclosures were necessary despite any arguments to the contrary. The city filed its valuation disclosure.

Petitioner also argues that dismissal was too strict a punishment considering the lack of prejudice to the city. This argument is predicated on the lack of any need to file and exchange valuation disclosures. Once again, petitioner did not properly challenge below the order requiring valuation disclosures. The MTT had the authority to dismiss the tax appeal earlier than when it actually dismissed the case, yet the tribunal repeatedly gave petitioner the opportunity to correct its failure to comply.[14] Instead of dismissing the case, the MTT entered a default pursuant to 1999 AC, R 205.1247(1), which allowed petitioner the chance to cure the defect and move to set aside the default. When petitioner failed to do so, the MTT had the authority to dismiss the case pursuant to 1999 AC, R 205.1247(1); however, the MTT yet again gave petitioner an opportunity to file and exchange a valuation disclosure and move to set aside the default. When petitioner once again failed to comply, the MTT had no relevant punishment left to invoke but dismissal.

Stevens, supra at 761-762, indicated that prejudice must be considered in the context of determining whether the MTT abused its discretion in dismissing a case for failure to comply with a rule or order. Here, the prejudice to the city was the continual delays in the proceedings that were initiated in 1996 and the additional costs of litigation associated with those delays, which could conceivably have been never-ending had no dismissal taken place.[15] Further, as touched upon by the MTT, the relevance of prejudice is questionable given that petitioner never attempted to set aside the default. The MTT did not abuse its discretion in dismissing the tax appeal.

We acknowledge that we are troubled to some degree in affirming the dismissal in light of *WCW Acquisition, supra*, which apparently would require a ruling favorable to petitioner;

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[13] "Written opposition, if any, to motions shall be filed within 14 days after service." 1999 AC, R 205.1230(1).

[14] "Failure of a party to properly prosecute the appeal, comply with these rules, or comply with an order of the tribunal is cause for dismissal of the appeal . . . ." 1999 AC, R 205.1247(4).

[15] With regard to petitioner's claim that a valuation disclosure was attached to its response to the city's motion to dismiss, we have no basis to question the MTT's finding that no disclosure was attached. The record contains a half-page document titled "valuation disclosure," which references only "taxable values;" however, it is unclear whether the MTT found that this document did not constitute a proper valuation disclosure or if it did not see the document. Considering the voluminous documents constituting the city's valuation disclosure, we find it questionable that petitioner's half-page document was acceptable. Regardless, as noted by the tribunal, the disclosure would have been late and petitioner still failed to file a motion to set aside the default.

however, the dismissal was brought upon petitioner by its own hand, and we cannot permit such blatant disregard of the MTT's rulings and orders without the accompanying consequences.

Affirmed.

/s/ Hilda R. Gage
/s/ William B. Murphy
/s/ Kathleen Jansen